No. 12881

# In the United States Court of Appeals for the Ninth Circuit

Bank of America National Trust and Savings Association, petitioner

*v.*

Commissioner of Internal Revenue, respondent

*ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES*

## BRIEF FOR THE RESPONDENT

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## BRIEF FOR THE RESPONDENT

### OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 119–143) are reported at 15 T. C. 544.

### JURISDICTION

This proceeding involves a deficiency in federal income tax and a deficiency in declared value excess profits tax, both for the taxable year 1943, asserted against the Bank of America National Trust and Savings Association, herein sometimes referred to as the taxpayer. The taxpayer filed its corporation income and declared value excess profits tax return for the calendar year 1943 with the Collector of Internal Revenue for the First District of California on

March 14, 1944. (R. 103.) Under date of June 5, 1945, the Commissioner of Internal Revenue mailed to the taxpayer a notice of deficiency pursuant to Section 272 of the Internal Revenue Code. (R. 16–23.) Under date of August 21, 1945, the taxpayer duly filed with the Tax Court its petition for review of the Commissioner's determination of deficiencies (R. 3), and on May 28, 1946, leave therefor having been granted by the Tax Court (R. 3, 6–7), the taxpayer filed its amended petition for review of such determination (R. 7–15). On December 22, 1950, the Tax Court entered its decision (R. 143–144) sustaining the Commissioner's determination. The case is brought to this Court by a petition for review filed by the taxpayer on February 9, 1951. (R. 145–151.) The jurisdiction of this Court is invoked under Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

## QUESTION PRESENTED

Whether, under the facts, the taxpayer sustained a deductible loss for income tax purposes under Section 23 (f) of the Internal Revenue Code upon the transfer of legal title to eight of its banking premises in 1943 for a price less than the adjusted basis of such properties to it and the transferee of legal title, pursuant to a preexisting oral agreement with the taxpayer, transferred title to such properties to a wholly owned subsidiary of the taxpayer approximately thirty days later at the same price.

## STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

Sec. 23. Deductions from gross income.

In computing net income there shall be allowed as deductions:

* * * * *

(f) *Losses by Corporations.*—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

* * * * *

(26 U. S. C. 1946 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.23 (e)–1. *Losses by Individuals.*—

* * * * *

In general losses for which an amount may be deducted from gross income must be evidenced by closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed. Substance and not mere form will govern in determining deductible losses. Full consideration must be given to any salvage value and to any insurance or other compensation received in determining the amount of losses actually sustained. See section 113 (b). For special provisions with respect to war losses, see section 127.

* * * * *

Sec. 29.23 (f)–1. *Losses by Corporations.*—Losses sustained by domestic corporations during the taxable year and not compensated for by insurance or otherwise are deductible insofar as

not prohibited or limited by sections 23 (g), 23 (h), 24 (b), 112, 117, 118, and 251. The provisions of sections 29.23 (e)–1 to 29.23 (e)–5, inclusive, and section 29.23 (i)–1 are in general applicable to corporations as well as individuals. See section 232 as to deductions by foreign corporations. For special provisions with respect to war losses, see section 127.

## STATEMENT

The Commissioner of Internal Revenue determined a deficiency of $915,040.93 in the income tax reported by the Bank of America National Trust and Savings Association for 1943 and a deficiency of $161,650.70 in the declared value excess profits tax reported by it for that year. (R. 16–23.) These deficiencies were based upon several adjustments made by the Commissioner to the taxpayer's reported income (R. 18), only one of which, a loss of $464,811.68 claimed by the taxpayer as having been sustained during the year on the sale of bank premises which the Commissioner disallowed, was challenged in the proceeding before the Tax Court (R. 120–121). Also, the Commissioner filed an amended answer in the Tax Court claiming an increase of $27,296.45 in the income tax deficiency and an increase of $4,822.17 in the declared value excess profits tax. (R. 26–27.) The taxpayer, by stipulation, accepted the adjustments to income on which the Commissioner's claim for increased deficiencies was based. (R. 41.) The Tax Court sustained the Commissioner's determination (R. 143), and the original deficiencies having been paid (R. 41), entered its decision redetermining

deficiencies in the amounts claimed by the Commissioner in his amended answer. (R. 143–144.)

The case was submitted to the Tax Court on a stipulation of facts (R. 31–41) and certain documentary exhibits, some of which (Exs. 1–A to 16–P, inclusive (R. 61–97)), were made a part of the stipulation and the remainder (Exs. 17–Q to 22–V, inclusive) were submitted in evidence by agreement of the parties (R. 98–116). The Tax Court found the facts as stipulated. They are fully summarized in the Tax Court's findings of fact (R. 121–133).

Taxpayer is a national banking association which was incorporated on March 1, 1927, under the laws of the United States. It operates a banking system in California through approximately 500 branches, and has its principal place of business in San Francisco. Title to some of the buildings in which the taxpayer conducts its banking business is held in the name of the taxpayer, and title to other such properties is held in the name of Merchants National Realty Corporation, a wholly owned subsidiary, hereinafter referred to as "Merchants". (R. 121.)

At all times pertinent to this proceeding, Merchants National Realty Corporation was a wholly owned subsidiary of the taxpayer. Many of the officers and directors of the taxpayer were also officers and directors of Merchants. The only business of Merchants was the ownership of property which it leased to the taxpayer. Merchants had no salaried employees. Whatever work was necessary to the operation of its business was performed by employees of the taxpayer. Merchants' place of business was in the head-

quarters of the taxpayer in San Francisco. (R. 121–122.)

The basic lease agreements under which the taxpayer leased property from Merchants (R. 72–78) provided that in exchange for a 10-year lease, the taxpayer would pay to Merchants as rent "an amount equal to the total of all expenses and charges of the Lessor, which are allowable to the Lessor, Merchants National Realty Corporation, as deductions from gross income for Federal income tax purposes, less an amount equal to the total income of the Lessor derived from all services other than the rental to be paid hereunder." (R. 122.)

On August 31, 1939, bank examiners from the office of the United States Comptroller of the Currency determined that the values of the banking properties in the books of taxpayer were in excess of their fair market value, and they recommended that the taxpayer be required to reduce the book values to the actual values of the banking properties in its books. The taxpayer refused to comply with the recommendation of the bank examiners and contended that the Comptroller of the Currency did not have the authority to require it to write down the value of any of its assets. After a number of conferences and exchanges of correspondence between the taxpayer and the Office of the Comptroller of the Currency (R. 61–72), an agreement was reached on March 6, 1940, as to the amount at which each banking property should be carried on the taxpayer's books. This agreement provided that "the unallocated reserve set up by the Bank [taxpayer] shall be reduced by the

difference between the present carrying value of each such premise and the value of such as determined by the committee [comprised of three Government banking officers]. * * * The remainder of such reserve, if any, may be returned to the undivided profits accounts." (R. 122–123.) In March, 1941, the taxpayer informed the committee that (R. 123):

> We will agree to establish a new cost basis for the bank premises listed in Exhibit "A" hereto attached in such manner as will result in a charge of approximately $1,000,000 against our profits for the period ending June 30, 1941, and a similar charge in the third quarter of 1941. The new cost basis to be established shall be determined from the American Appraisal Company appraisal, using the lowest appraisal of the American Appraisal Company as to the particular properties involved. No adjustment will be made as to properties with respect to which American Appraisal Company's most adverse appraisal exceeds book value.

The committee recommended that $2,000,000 be written off by the taxpayer in 1941 and $2,000,000 be written off in 1942. The Comptroller of the Currency accepted this proposal and informed the taxpayer to that effect. (R. 123–124.) The Comptroller also informed the taxpayer that (R. 124):

> Any or all of the amount may be charged to Undivided Profits instead of the Unallocated Reserve if desired, the amount of that Reserve, however, not to be reduced below $4,000,000 except after writeoff of the $2,000,000 in 1941 and approximately $2,000,000 in 1942.

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The taxpayer informed the Comptroller that these arrangements for a "reduction in book value of banking premises" were satisfactory to it. (R. 124.)

George H. Koster, one of the taxpayer's counsel, was asked by the taxpayer if he could advise it of a method whereby the Comptroller's requirement that the properties be written down could be met, without at the same time receding from the taxpayer's position that it was entitled to carry the properties at cost. He gave suggestions to the taxpayer which are recorded in a memorandum dated January 10, 1941. (R. 91–95, 124.)

The substance of this memorandum (R. 91–95) is that Mr. Koster first suggested as a means of reducing book values of such assets an arrangement for the purchase and sale of properties between the taxpayer and Merchants so that the purchase price would be a figure satisfactory to the committee and in accordance with the agreement; that the taxpayer's officers felt that since this was a transaction between the parent and a wholly owned affiliate the purchase and sale transaction might be ignored and the transaction considered a write-down which would establish a precedent whereby the taxpayer might be compelled to continue the practice of arbitrarily writing down the value of its banking premises, a precedent which the taxpayer did not want to establish; that Mr. Koster then suggested that if the taxpayer and Merchants would be willing to assume the risks which might result where property is removed from their hands, even for a short period of time, they might arrange

for some other company, such as Capital Company (a large real-estate company which was a wholly owned subsidiary of Transamerica Corporation, a substantial stockholder of the taxpayer), to purchase the property from one and then sell it to the other, as an accommodation, but that they should be compensated for the work involved in the transfers of the properties. The memorandum also shows that the results of such transactions from a tax standpoint were considered and discussed.

Koster and L. M. Giannini, president of the taxpayer, discussed the tax effects of the transactions and the results to be achieved by them with a representative of the Comptroller who informed them that the Comptroller could not pass upon the tax consequences of any of the transactions. (R. 124–125.)

Transamerica Corporation is a holding company. It owns substantial amounts of stock of many banks and industrial concerns. During 1941, 1942, and 1943, either Transamerica Corporation or its subsidiary companies owned common and preferred stock of taxpayer, each of which had equal voting rights. During 1941, 1942, and 1943, the outstanding common stock of the taxpayer amounted to 4,000,000 shares; and there was preferred stock outstanding in the amount of 540,000 shares in 1941, 460,796 shares in 1942, and 405,146 shares in 1943. Transamerica and its subsidiaries owned common and preferred stock of the taxpayer in 1941, 1942, and 1943 in the following amounts set forth below (R. 125–126):

*Stock owned by Transamerica and subsidiaries*

| | 1941 | 1942 | 1943 |
|---|---|---|---|
| Common | 899, 820 | 692, 394 | 570, 134 |
| (Outstanding) | (4, 000, 000) | (4, 000, 000) | (4, 000, 000) |
| Preferred | 500, 844 | 425, 174 | 370, 634 |
| (Outstanding) | (540, 000) | (460, 796) | (405, 146) |

Capital Company (hereinafter sometimes referred to as "Capital") is a wholly owned subsidiary of Transamerica Corporation and is engaged in the real estate business. (R. 126.)

Sometime in 1941, R. G. Smith, who was the executive vice-president of the taxpayer and the president of Merchants, conferred with E. C. Woodruff, the president of Capital. An agreement was reached between these two executives in behalf of their respective companies. (R. 126.) It was stipulated that this agreement provided (R. 35–36, 127–128):

> * * * That the Bank [taxpayer] or Merchants would execute deeds to Capital Company with respect to [certain] banking premises * * *; that Capital Company would accept delivery of such deeds; that Capital Company would deliver its checks to the Bank [taxpayer] and to Merchants in amounts equal to the value of said premises as appraised by the American Appraisal Company; that the Bank [taxpayer] intended to and would receive back, deeds to the said property within thirty days or so after delivery of deeds thereto to Capital Company, and Capital Company agreed to execute and deliver deeds to said property to the Bank or Merchants at any time upon request of the Bank; that there would not be any written agreement between the Bank, Merchants and Capital Company providing

> for the execution and delivery of deeds from Capital Company to the Bank or to Merchants; that when the Bank requested delivery of deeds to such property from Capital Company to it or to Merchants, the Bank or Merchants would give its check to Capital Company for the same amount of the check which Capital Company gave the Bank or Merchants for the respective property, plus acquisition costs incurred by Capital Company in connection with the transaction; and that between the time of the delivery of the deeds with respect to the respective properties from the Bank or from Merchants to Capital Company, and the time of the delivery of the deeds with respect to the respective properties from Capital Company to the Bank or to Merchants, the Bank would pay to Capital Company as rental amounts equal to 6% per annum net upon the amounts paid by Capital Company to the Bank or to Merchants, as aforesaid. * * *

Pursuant to this agreement, Merchants deeded four of the banking premises to which it held title to Capital in 1941, and Capital, in turn, deeded the properties to the taxpayer shortly thereafter. (R. 79.) The amounts paid by the taxpayer to Capital were the same as the amounts which had been paid by Capital to Merchants. Merchants showed losses from these transactions on its books and in its tax return in the total amount of $503,373.97. In 1942 Merchants similarly deeded ten of the banking premises to which it held title to Capital which, in turn, deeded them to the taxpayer for the same amounts which it had paid to Merchants. (R. 79.) Merchants showed losses from these transactions in the amount of

$463,593.85 on its books and in its tax return. (R. 128.)

In the year 1941, the taxpayer executed and delivered to Capital deeds to sixteen banking premises. About thirty days after each deed was delivered to Capital, Capital executed and delivered a deed to the same property to Merchants. The amounts received by the taxpayer from Capital were the same as the amounts which were paid to Capital by Merchants. (R. 79.) According to the taxpayer's books and tax return, these transactions resulted in losses to it in 1941 which totalled $1,383,039.64. In the year 1943, the taxpayer executed and delivered to Capital deeds to eight banking premises. About thirty days after each deed was delivered, Capital executed and delivered a deed to the same property to Merchants. The amounts received by the taxpayer from Capital for these properties were the same as the amounts received by Capital from Merchants. (R. 79, 128–129.) The eight transfers by the taxpayer in 1943, the details of which are set out in the Tax Court's findings (R. 130), resulted in an alleged loss of $464,811.68, which the taxpayer claimed in its return and which the Commissioner disallowed. The deductibility of this loss is the only issue involved here. (R. 131.)

In carrying out the above transactions, all formalities in connection therewith, such as the execution and recording of deeds, the affixing of documentary stamp taxes, the transfer of fire insurance, and the recording of the transactions on the books of all companies as purchases and sales of property, were com-

plied with. When the properties were deeded to Capital, the outstanding fire insurance policies covering the respective properties were amended by riders to provide that any loss payable thereunder should be paid to Capital; and when Capital deeded the properties to the taxpayer or to Merchants, the policies were again amended by riders to provide that any loss payable thereunder should be paid to the taxpayer or to Merchants, respectively. (R. 131.)

Upon the execution and delivery of the deeds to the respective properties by the taxpayer or Merchants to Capital, the taxpayer and Capital executed a "lease" agreement with respect to each property, which provided for the payment by the taxpayer to Capital of a "rental" equal to a return of 6 per cent per year to Capital on the money which it had paid out. (R. 131.)

All of the properties to which Merchants acquired formal title through Capital were immediately leased by Merchants to the taxpayer under the same form of a basic lease agreement between those parties as stated above. (R. 131.)

At all times pertinent to this proceeding, the banking properties which were the subject of the transactions involved herein were occupied and used by branches of the taxpayer. It was not contemplated at any time that there would be any interruption or change in the use and occupancy of the banking properties by the branches of the taxpayer which occupied them. (R. 131–132.)

In his notice of deficiency the Commissioner explained his reasons for disallowing the above deduction as follows (R. 19):

(1) Net loss claimed on the sale of assets other than capital assets includes losses of $464,811.68 on the sale of certain banking premises to the Capital Company. The Capital Company held legal title to these properties for a period of one month and received rent from you for such period of ownership. The properties were then sold by the Capital Company to the Merchants National Realty Corporation, your wholly owned subsidiary.

The Transamerica Corporation controlled all of the outstanding shares of the Capital Company. Approximately 22 per cent of your stock was owned by the Transamerica Corporation group.

Under date of August 1, 1936, you entered into an agreement with the Merchants National Realty Corporation whereby you leased from the Merchants National Realty Corporation certain banking premises. The rental was to be an amount equal to the total of all expenses and charges of the lessor allowable to said lessor as deductions from gross income for federal income tax purposes, less an amount equal to the total income of the lessor derived from all other sources. The result of this agreement is that all operations of the Merchants National Realty Corporation were merged with your operations, leaving no income of the Merchants National Realty Corporation subject to income tax.

It is held that no deductible loss resulted from the sale of banking premises to the Capital Company. Your taxable income is, therefore, increased $464,811.68.

On the basis of the foregoing facts the Tax Court found as a fact that (R. 133):

> Capital was merely a conduit through which petitioner [taxpayer] made formal transfers of the title to the eight properties involved in this proceeding to its subsidiary, Merchants. The transfers of title to the eight properties by petitioner [taxpayer] to Capital did not constitute bona fide sales of the parcels of property to Capital.
>
> Petitioner [taxpayer] at all times had complete ownership, dominion, and control over Merchants and over each of the eight parcels of property.

## SUMMARY OF ARGUMENT

The Internal Revenue Code provides that in computing the taxable net income of a corporation there shall be allowed as a deduction, among others, losses sustained during the taxable year and not compensated for by insurance or otherwise. The loss, to be deductible, must be a real loss and the burden is upon the taxpayer claiming such deduction to prove that a loss was actually sustained during the taxable year. In order for a loss upon a sale of property to be deductible it must be a bona fide sale. Where an alleged sale of property is made as a part of a composite plan which includes an agreement for reacquisition of the property sold, and the plan is carried out, no deductible loss is incurred as a result of the purported "sale." It makes no difference that the property is to be reacquired by a subsidiary or a

close affiliate of the original seller rather than by the seller itself.

Here the taxpayer purportedly "sold" certain of its banking premises to Capital Company under an oral agreement previously entered with officers of Capital Company whereby Capital Company would reconvey the same properties at the same price to Merchants National Realty Corporation about thirty days later. This agreement between the taxpayer and Capital Company was purposely not reduced to writing but it was fully executed in the case of each transfer of property. Capital Company accepted title to the premises involved, and later transferred such title to Merchants purely as an accommodation to the taxpayer and the fact that the agreement to retransfer was not reduced to writing does not make the transfers to Capital Company completed sales which resulted in deductible losses.

The only purpose of these transfers of property, other than a possible tax saving which might result, was to effect a reduction in the net book value of its banking facilities as required by the Comptroller of the Currency, but in a way chosen by the taxpayer. The properties were transferred to Capital Company at a price less than the taxpayer's adjusted basis for computing gain or loss thereon, and were retransferred to Merchants at the same price. Under the facts of this case the transfer of title to the properties involved to Merchants did not result in a deductible loss to the taxpayer.

## ARGUMENT

### I

**The Tax Court did not err, under the facts, in holding that the taxpayer did not sustain a deductible loss for the taxable year 1943 on the transactions here involved**

In this proceeding the taxpayer is claiming a deduction of $464,811.68 [1] from its gross income for 1943 as a loss allegedly sustained during that year, under the circumstances stipulated by the parties, upon the transfer of banking premises occupied by eight of its branch banks. The deduction is claimed under Section 23 (f) of the Internal Revenue Code, *supra,* which provides that in computing taxable net income of a corporation there shall be allowed as a deduction from gross income, "losses sustained during the taxable year and not compensated for by insurance or otherwise."

It has long been settled that deductions from gross income and exemptions from tax are granted only as a matter of legislative grace; that statutes granting such deductions or exemptions are to be strictly construed; and that the burden is upon the taxpayer claiming exemption or a deduction from gross income to bring himself squarely within the provisions of

[1] The taxpayer admits that the amount actually deductible would be subject to recomputation as a result of this Court's decision in *Bank of America National Trust & Savings Assn.* v. *United States*, 168 F. 2d 399, certiorari denied, 335 U. S. 827, which would affect the basis for computing losses in this case if it is eventually held as a matter of law that the transactions involved resulted in deductible losses (R. 46–49, 56).

the statute granting such relief.[2] It likewise is equally well settled, as will more fully appear from the following discussion, that any alleged loss, to be deductible for income tax purposes, must be actually "sustained" by the taxpayer.[3] Finally, the question whether a deductible loss has been sustained is essentially a question of fact to be determined in the first instance by the trial court, leaving for determination by the appellate court only the question whether the trial court's conclusion was "clearly erroneous." Rule 52 (a) of the Federal Rules of Civil Procedure. *Barnhart-Morrow Consol.* v. *Commissioner,* 150 F. 2d 285 (C. A. 9th); *Motter* v. *Wallace,* 72 F. 2d 678 (C. A. 10th).

The substantive requirements of deductibility of an alleged loss are succinctly stated in the Treasury Regulations promulgated under the Internal Revenue Code. Section 29.23 (e)–1 of Regulations 111, *supra,* relating to losses sustained by individuals and not compensated for by insurance or otherwise, aptly states that in general losses for which an amount may be deducted from gross income must be evidenced by "closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed." Section 29.23 (f)–1 of Regulations 111, *supra,* provides that, so far as material, the provisions of the Regulations relating

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[2] *Burnet* v. *Houston*, 283 U. S. 223, 227; *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 326; *Ilfeld Co.* v. *Hernandez*, 292 U. S. 62, 66; *Deputy* v. *du Pont*, 308 U. S. 488, 493; *Helvering* v. *Northwest Steel Mills*, 311 U. S. 46, 49.

[3] *Burnet* v. *Huff*, 288 U. S. 156, and cases cited; *Gregory* v. *Helvering*, 293 U. S. 465.

to the deductibility of losses sustained by individuals are generally applicable as well to corporations.

Since, as stated above, the question whether a deductible loss has been sustained within the meaning of the taxing statute is primarily a question of fact to be determined in the first instance by the trial court on the basis of the evidence before it, the only useful purpose which could be served by a review of any or all of the great number of decided cases involving deductibility of alleged losses is to demonstrate the applicability of the above principles to the facts of the particular case under consideration. And when the facts of the instant case are considered in the light of the above principles it will be seen that the decision of the Tax Court herein not only is not "clearly erroneous", but that it is clearly right. In other words, the complete answer to the taxpayer's protestations of error on the part of the Tax Court, and its lengthy and somewhat repetitious argument (Br. 14–73), is that the taxpayer did not suffer any real loss as a result of the circuitous transactions upon which it bases its claim for deduction.

The stipulated facts in this case (R. 31–41) plus the documentary exhibits introduced in evidence (R. 61–116), clearly show that there was no real disposition by the taxpayer, or even an intended disposition, of the branch banking properties on which the loss here involved is claimed. No real loss was suffered. On the recommendation of his bank examiners the Comptroller of the Currency required the taxpayer to write down or charge off a substantial amount from the book value of its banking premises account. The tax-

payer contended that the Comptroller of the Currency had no authority to make such a demand upon it. But in a circuitous way the taxpayer complied with the Comptroller's demand, and that is the only substantive thing accomplished by the transactions outlined above. In its opinion the Tax Court held (R. 140, 142) that the Comptroller of the Currency had authority to require this reduction in the book value of the taxpayer's banking facilities. But whether there was authority for the Comptroller's requirements does not appear to be material here. As stated, the taxpayer did comply with them. The mechanics adopted by the taxpayer to effect these requirements of the Comptroller constitute the basis of its claim for a loss deduction for 1943, which is the year involved here. But, as we will show below, in addition to the requirements of the Comptroller the taxpayer also had tax savings in mind when it adopted these mechanics.

The taxpayer very aptly prefaces its argument with the statement (Br. 14) that the relationship between the parties to the sales transactions here involved is of primary importance in determining whether the decision of the Tax Court is right or wrong. It was this relationship between the corporations involved, and their officers, which made it possible for the taxpayer to accomplish in the manner it did the reduction in book value of its banking facilities as required by the Comptroller of the Currency without incurring any risk of actual loss of such properties. It was this relationship between the parties, and the arrangements which the taxpayer was able to make before it

transferred any of its banking properties,[4] which led to the affirmative finding by the Tax Court (R. 133) that Capital Company was merely a conduit through which the taxpayer made formal transfers of title to the eight properties here involved and that these transfers of title did not constitute bona fide sales of those particular properties to the Capital Company.

A substantial part of the taxpayer's argument (Br. 17–68) is devoted to the proposition that the Tax Court erred in finding (R. 133) that the sales of these particular branch banking premises to the Capital Company were not bona fide sales, but that Capital Company merely served as a conduit through which legal title was transferred to Merchants National Realty Corporation, the taxpayer's wholly owned subsidiary. Throughout its argument the taxpayer insists that this circuitous means of reducing the book value of its banking premises was not prompted by any tax saving motive. Its argument is that this method of complying with the requirements of the Comptroller of the Currency was adopted solely to avoid setting a precedent which might be embarrassing in the future because it did not agree that the Comptroller could require it to write down the book value of its banking premises. Br. 18, 19, 20, 25, 28, 36, 39, 41, 45, 47, 52, 55, 56–57, 62, 64–65, 66, 71.)

[4] Similar transfers of branch banking premises, either from the taxpayer to National Merchants Realty Corporation, or vice versa, during 1941 and 1942, through Capital Company (R. 34–37, 39), which were executed for the same general purpose, are not involved here. Apparently the tax liability for those years involving this issue is pending before the Bureau of Internal Revenue on refund claims. (R. 46.)

But this argument is not very convincing because the taxpayer did establish a precedent which would be as effective in the future, so far as the Comptroller of the Currency is concerned, as if it had simply written down the book value of its banking premises. The record clearly shows that the Comptroller of the Currency was not interested in the method adopted by the taxpayer in complying with his requirements. Any method adopted then would seem to set a precedent, if that was the taxpayer's chief worry, as it would have this Court believe, if the Comptroller of the Currency should see fit to require a similar reduction of book values at a future date.

Also, there is no merit to the taxpayer's repeated assertion that there was no tax motive involved in the method selected to effect the reduction in book values required by the Comptroller of the Currency. The memorandum of the taxpayer's tax counsel (R. 91–95) clearly shows that taxes were a major consideration. In fact, on the record as a whole, there is more justification for claiming that the method adopted by the taxpayer to effect a reduction in the book value of its branch banking properties was solely for the purpose of securing a loss deduction than there is for the taxpayer's contention that the method adopted was solely to spite the Comptroller of the Currency. In our opinion the Tax Court indulged in understatement when it said (R. 140): "The evidence shows that possible tax advantages were an important consideration in arriving at the complicated form in which the simple requirement of the Comptroller was met." However, the Tax

Court's decision was not based upon any intent on the part of the taxpayer to effect a tax saving while complying with the requirements of the Comptroller. It was based upon the conclusion, from the evidence, that no loss was actually sustained by the taxpayer as a result of the transactions here involved. As the Supreme Court said in *Minnesota Tea Co.* v *Helvering,* 302 U. S. 609, 613, "A given result at the end of a straight path is not made a different result because reached by following a devious path."

In its opinion the Tax Court relied to some extent upon the decisions of the Supreme Court in *Higgins* v. *Smith,* 308 U. S. 473; *Gregory* v. *Helvering,* 293 U. S. 465; *Burnet* v. *Huff,* 288 U. S. 156; and *Weiss* v. *Wiener,* 279 U. S. 333. (R. 134, 139, 143.) The taxpayer admits (Br. 27–28) that *Burnet* v. *Huff* and *Weiss* v. *Wiener, supra,* stand for the proposition that a loss from an alleged sale must be real and actual. That should be a sufficient answer here because the facts show that this taxpayer did not sustain an actual loss in the transfer of the eight banking premises to its wholly owned subsidiary. We cannot agree with the taxpayer (Br. 27–28) that these decisions are of no help in determining the issue here involved.

The taxpayer then proceeds to argue (Br. 28–38) that the decisions in *Gregory* v. *Helvering* and *Higgins* v. *Smith, supra,* are inapplicable here because the transactions which the courts held should be disregarded in those cases were entered into solely for tax saving purposes, while the transactions involved in this proceeding had no tax saving motive. The

taxpayer is wrong in insisting that there was no tax saving motive behind the transfers of property here involved. But laying aside any consideration of tax saving, it is clear that these two decisions, and many which have followed them, are not based primarily upon the tax saving motive which prompted the transactions involved in those cases. In *Gregory* v. *Helvering, supra,* the Supreme Court, after pointing out (p. 469) that a taxpayer has a right to minimize or avoid his taxes by any means which the law permits, said: "But the question for determination is whether what was done, *apart from the tax motive,* was the thing which the statute intended." (Italics supplied.) The Court then added that the "reasoning of the court below in justification of a negative answer leaves little to be said." The opinion of the Court of Appeals for the Second Circuit in that case[5] makes it clear that the presence of a tax saving motive was not the only consideration in its decision. This is strengthened by the recent opinion of Judge Learned Hand (who wrote the Court of Appeals opinion in the *Gregory* case) in *Commissioner* v. *Transport, Trad. & Term. Corp.,* 176 F. 2d 570, certiorari denied, 338 U. S. 955, where he said (p. 572):

> The doctrine of *Gregory* v. *Helvering, supra,* which we here hold to be controlling, is not limited to cases of corporate reorganizations. It has a much wider scope; it means that in construing words of a tax statute which describe commercial or industrial transactions we are to understand them to refer to transactions entered

[5] *Helvering* v. *Gregory*, 69 F. 2d 809.

upon for commercial or industrial purposes and not to include transactions entered upon for no other motive but to escape taxation.

Incidentally, it should be noted that the Supreme Court denied certiorari in the *Transport Trading & Terminal Corp.* case, *supra,* on February 13, 1950, after it had decided *United States* v. *Cumberland Pub. Serv. Co.,* 338 U. S. 451, also relied upon by the taxpayer (Br. 48–49). The only respect in which the latter case seems to be applicable here is that it emphasizes the factual nature of cases of this character and that the decision of the trial court should not be reversed unless clearly erroneous.

We submit that, despite the taxpayer's argument (Br. 47–68), the Tax Court correctly held (R. 137) that the facts in this proceeding show beyond any doubt that there were no real and complete sales of any of the banking properties to Capital Company by the taxpayer in the taxable year here involved which resulted in a deductible loss for tax purposes. It is true that legal title to the properties was transferred to Capital Company in 1943. But in determining whether a loss on an alleged sale has been sustained for tax purposes the transfer of title is only one of the elements to be considered. Prior to any transfers of banking premises to Capital Company in 1941, either by the taxpayer or by Merchants National Realty Corporation, the taxpayer entered into an oral agreement with the president of Capital Company (R. 35–37) which, if carried out, would insure the taxpayer against losing dominion and control over any of the transferred banking premises,

even during the brief period that title was lodged in Capital Company, and would insure the reacquisition of title by the taxpayer or its wholly owned subsidiary after the lapse of the brief period of thiry days or so. In each instance, in 1941 and 1942 as well as for the year here involved, where title to one of the taxpayer's branch banking premises was transferred to Capital Company by the taxpayer or by Merchants the title was retransferred to ~~one or~~ the other by Capital Company about thirty days later. In each instance the particular branch bank continued to occupy the premises under a so-called "lease" agreement (R. 36, 38, 81–87) under which, for the short period during which title was in Capital Company, the latter received from the taxpayer as "rental" an amount equal to 6% per annum on the price at which the property was transferred to Capital Company. In making this agreement with the taxpayer the officers of Capital Company were assured that in the case of any transfer of title to Capital Company the taxpayer "intended to and would receive back" deeds to the property within thirty days or so after such deeds were delivered to Capital Company (R. 36).

It is clear from the record, and the taxpayer does not contend otherwise, that in executing these transfers of title to Capital Company the taxpayer had no intention of parting with title to the properties involved or of surrendering dominion or control over them. Capital Company accepted and re-transferred title to these properties solely as an accommodation to the taxpayer. It was compensated by the tax-

payer for these accommodation services and properly reported such compensation as income in its tax returns. (R. 38.) But it does not follow, as contended by the taxpayer (Br. 45), that by taxing the Capital Company on this income the Commissioner has in any way recognized the transfers of title to Capital Company as completed sales of the properties involved. The transfers of title to Capital Company were not completed and closed transactions, despite all the efforts of the taxpayer to make them appear as such. These transfers were merely steps in the taxpayer's plan to reduce the book value of the banking premises involved in some way other than a simple write-down of those values—which clearly would not provide any basis for a tax deduction. The taxpayer did not intend to, and did not, part with control and dominion over these properties. As the Tax Court pointed out (R. 136), where a sale is made as a part of a composite plan which includes, as in this proceeding, an agreement for reacquisition of the property sold, and the plan is carried out, any alleged loss suffered as a result of the "sale" of the property is not deductible. See *Du Pont* v. *Commissioner,* 118 F. 2d 544 (C. A. 3d), certiorari denied, 314 U. S. 623; *Foster* v. *Commissioner,* 96 F. 2d 130 (C. A. 2d); *Shoenberg* v. *Commissioner,* 77 F. 2d 446 (C. A. 8th), certiorari denied, 296 U. S. 586; *Commisisoner* v. *Dyer,* 74 F. 2d 685 (C. A. 2d), certiorari denied, 296 U. S. 586. Furthermore, it makes no difference whether, as here, the property is to be reacquired by a subsidiary or close affiliate of the original seller rather than by the seller itself. *Rand* v. *Helvering,*

77 F. 2d 450 (C. A. 8th); *John M. Burdine Realty Co.* v. *Commissioner,* 20 B. T. A. 54.

The taxpayer argues (Br. 38–47), contrary to the finding of the Tax Court (R. 133), that it lost dominion and control over the banking premises which it transferred to Capital Company because the agreement for retransferring title thereto to Merchants National Realty Corporation was oral and could not have been enforced. It relies upon Sections 1971 and 1973 of the California Code of Civil Procedure (Br. 44), which require such agreements to be in writing. However, counsel failed to mention Section 1972 of the Code of Civil Procedure, which provides Section 1971 must not be construed to abridge the power of any court to compel the specific performance of an agreement in case of part performance thereof. But whatever defense Capital Company might otherwise have had by reason of the fact that its agreement to retransfer to Merchants was not in writing, the fact remains that this agreement was fully executed in each instance by the transfer of title to Merchants approximately thirty days after title was transferred to Capital Company by the taxpayer. And it is well settled in California that no attack can be made upon a contract under the statute of frauds after it has been fully performed. See *James* v. *Hall,* 88 Cal. App. 528, 264 Pac. 516; *Atkinson* v. *Boynton,* 97 Cal. App. 759, 276 Pac. 356; *McComsey* v. *Leaf,* 36 C. A. 2d 132, 97 P. 2d 242. We submit that to accept the taxpayer's argument under the facts of this case would be to prefer form over substance.

The taxpayer cites or quotes from a large number of other decisions in support of its argument that the transfers of banking premises were closed and complete transactions for the purpose of establishing a deductible loss. (Br. 34–67.) An extended review of these decisions could serve no useful purpose because, like the instant case, the decision in each case depended primarily upon the facts of the particular case and can be readily explained or distinguished. The taxpayer lays particular stress (Br. 60–63) upon the decision of the Board of Tax Appeals (now the Tax Court) in *Bancitaly Corp.* v. *Commissioner,* 34 B. T. A. 494, appeal dismissed, 121 F. 2d 452 (C. A. 9th). But, as the Tax Court pointed out (R. 137–138), there is little similarity between the instant proceeding and that in the *Bancitaly Corp.* case in either the matter of facts or the issue involved. In the *Bancitaly Corp.* case the bank sold 150,000 shares of stock and subsequently reacquired 84,198 of the shares which it had sold. The issue in the case was whether the bank had realized taxable income upon the sale of the 84,198 shares which it subsequently repurchased. In that case the Board expressly found, from the evidence before it, that the sale of the 150,000 shares of stock and subsequent repurchase of 84,198 of those shares were separate and independent transactions and that the original purchaser was under no obligation to resell any of the shares to the bank. A similar finding here clearly is not warranted by the evidence in the instant case.

The agreement between the taxpayer and Capital Company under which Capital Company agreed to

accept title to the banking premises from the taxpayer or Merchants and retransfer such title to the other corporation some thirty days later purposely was not reduced to writing. (R. 34–37.) The only plausible explanation for this gentlemen's agreement is that it was thought by the taxpayer that not reducing this agreement to writing might give the transfers a color of reality. Whether this added color of reality was sought for the taxpayer's gratification in its dealings with the Comptroller of the Currency, as the taxpayer maintains, or whether it was sought for tax purposes, which seems more logical since the Comptroller did not care how the reduction in book value of its banking facilities was accomplished, it is clear from the record that any risk which the taxpayer assumed as a result of the outwardly unqualified transfers of property to Capital Company was negligible. The relationship of the parties was such as to assure full compliance with this oral understanding. According to the taxpayer's own statement (Br. 61–62), Bancitaly Corporation, mentioned above, was a predecessor of Transamerica Corporation, which prior to 1937 owned all of the stock of the taxpayer. The stipulation (R. 39–40) shows that Capital Company was a wholly owned subsidiary of Transamerica Corporation, and that in 1943 Transamerica Corporation and its subsidiaries still owned about 22% of the outstanding stock of the taxpayer. Joint Exhibit 15–O (R. 95–96) shows that L. M. Giannini was a director of Merchants National Realty Corporation in 1943. Joint Exhibit 16–P (R. 96–97) shows that A. P. Giannini was chairman of the board of directors

of the taxpayer and that L. M. Giannini (son of A. P. Giannini) was president,[6] chairman of the general executive committee, and a director of the taxpayer during 1943. The annual report of Transamerica Corporation (Joint Exhibit 19–S, not printed) for 1943 also shows that A. P. Giannini was chairman of the board of directors of that corporation in 1943 and that L. M. Giannini was a director and a member of the executive committee. What other connection, if any, existed between the two groups of corporations is not shown by the record, but this is sufficient to indicate that the oral agreement to reconvey, whatever its purpose, would be carried out. The best proof of good faith, however, is that reconveyances were made in each case as agreed upon.

## II

**The transfers of title of banking premises to its wholly owned subsidiary in 1943 did not result in a deductible loss to the taxpayer**

The taxpayer finally argues (Br. 68–73) that even if the temporary transfer of title to the banking premises involved to Capital Company in 1943 did not constitute closed and completed transactions for tax purposes it nevertheless sustained a deductible loss on the ultimate transfer of those properties to Merchants National Realty Corporation, its wholly owned subsidiary. The substance of its argument seems to be that regardless of any other considerations involved

[6] See also annual reports of the Bank of America (Joint Exhibits 17–Q and 18–R, not printed in the record) for the years 1942 and 1943.

the separate corporate identity of the taxpayer and Merchants cannot be disregarded for tax purposes. We think enough already has been said to show the fallacy of this argument. The deduction was disallowed because, under the facts, no real loss was sustained by the taxpayer. The situation is not comparable with the situation in those cases, some of which are cited in the Appendix to the taxpayer's brief, where transactions between controlled corporations or between a wholly owned corporation and its stockholders were found to be genuine business transactions. For instance, *National Carbide Corp.* v. *Commissioner,* 336 U. S. 422, so emphatically relied upon by the taxpayer (Br. 72, Appendix v-vi), does not stand for the rule, as asserted by the taxpayer "that separate corporate identities must not be ignored." Neither the corporations involved nor the Commissioner sought to ignore the separate identity of the participating corporations. The corporate taxpayers involved in that case were operating subsidiaries of Air Reduction Corporation, which received all of their net operating income over and above a 6% return on their capital stock under an operating contract with the subsidiaries. The only question decided by the Supreme Court was whether the operating companies received and paid over to the parent this income as agents of the parent or as operating taxpayers.

There is nothing in *National Carbide Corp.* v. *Commissioner, supra,* or any other of the cases cited by the taxpayer in its Appendix which would justify a holding here that the taxpayer sustained a loss by

the mere transfer of title to some of its banking premises to Merchants. The transfers were entirely without substance so far as the operation of the taxpayer's banking business was concerned. Merchants National Realty Corporation served no function other than to hold title to some of the taxpayer's banking premises. (R. 38.) It did not even hold title to all of such properties. (R. 34.) Those properties to which Merchants did hold title, including those to which title was transferred to it in 1943, were leased to the taxpayer under a blanket lease agreement executed in 1936 which left it impossible for Merchants to realize any gains or losses from the ownership of such properties. Under the circumstances here involved it could make no practical difference in the operation of the taxpayer's banking business whether the title to its banking premises was held by it or Merchants. We fail to see where the various transfers of title between the taxpaper and Merchant, both in the year here involved and in the preceding years, served any business purpose other than to effect a reduction in the net book value of such properties as required by the Comptroller of the Currency and provide a basis for this tax claim. We fail to see where the extent of Merchants' net worth, the volume of its so-called rental income and deductions, and the size of its bank balance, all emphasized by the taxpayer (Br. 69–70) could have any bearing upon the question here involved. The taxpayer did not make any disposition of banking premises during the year here involved which resulted in a deductible loss to it.

## CONCLUSION

The decision of the Tax Court is right. It is fully supported by the facts and the law. Since the taxpayer has failed to show that it is "clearly erroneous," it should be affirmed.

Respectfully submitted.

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